POLLOCK *v.* FARMERS' LOAN AND TRUST COMPANY.

WHEN a court of last resort not only overrules in effect three direct adjudications made by itself, but also refines away to the vanishing point two other of its decisions, and thereby cripples an important and necessary power and function of a coordinate branch of the government, and delivers an opinion in which is laid down a doctrine that is contrary to what has been accepted as law for nearly one hundred years, it is neither improper nor unprofessional carefully and earnestly to scrutinize that decision and the authorities and reasons upon which it is founded. Indeed, it is absolutely necessary to the science of jurisprudence and to the survival of correct legal principles that such a judgment should be subjected to analysis and to whatever criticism an examination of the reasons given for it may reasonably suggest. If it be demonstrably wrong, the consensus of opinion of the legal profession will in time work out the right. If it be demonstrably right, it will stand. As was said by Mr. Justice Gray and Judge Lowell on page 52 of their joint article, "A Legal Review of the Case of Dred Scott," which first appeared in 20 Law Reporter, 61, under the title "The Case of Dred Scott," and was afterwards printed in pamphlet form: —

> "We have freely exercised the right, which is allowed to every member of the profession, of controverting arguments and opinions advanced on any legal question by any individual, however distinguished by ability or position, so long as it is not judicially adjudged and settled. But upon the single point adjudicated, more deference is due to the deliberate judgment of the highest tribunal ot the country. As two judges, however, and those not the least eminent, do not concur even in the judgment, we feel it to be our duty to examine the soundness of the positions upon which it rests."

No case of recent times has occasioned so much discussion and notoriety as that of Pollock *v.* Farmers' Loan and Trust Company, 157 U. S. 429, and 158 U. S. 601, — the so called "Income Tax Case."

That cause was a bill in equity filed in the Circuit Court of the United States for the Southern District of New York by a citizen

of Massachusetts, a stockholder of shares of a value greater than five thousand dollars in the respondent company, which was a corporation organized under the laws of the State of New York, and having its usual place of business in the city of New York, and certain sums of its capital invested in real estate and in municipal bonds of the said city, and in other personal property. The bill charged that the respondent was about voluntarily to comply with the provisions of sections 27-37 [1] of the Act of Congress of August 27, 1894,[2] which it alleged were unconstitutional, null and void,[3] and if the respondent did comply with said sections of the said Act of Congress, it would be exposed to a multiplicity of suits; and the prayer of the bill was that it might be adjudged and decreed that sections 27-37 of the Act of Congress of August 27, 1894, were null and void; and that the respondent might be restrained from voluntarily complying with the provisions therein contained.

The respondent demurred to the bill for want of equity. The demurrer was sustained by the Circuit Court, which allowed an appeal directly to the Supreme Court of the United States.

Although it is nowhere so stated in the report of the case, the government of the United States was evidently allowed either to intervene or to be heard by the Court as an *amicus curiæ*.

Upon the first hearing and argument it was adjudged by a majority of the Supreme Court that so far as these sections attempted to lay and collect a tax upon income derived from rents, they were unconstitutional, as laying a "direct tax" within the meaning of the Constitution without apportioning it; and that also they were unconstitutional so far as they assumed to tax income derived from State and municipal bonds, as being a tax upon the instruments and govenmental functions of State governments,

[1] A most satisfactory summary of these sections will be found in 157 U. S. 434, which lack of space forbids reprinting here.

[2] 28 Stat. 509, 553.

[3] Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers. — *United States Constitution, Art.* I., *sect.* 2, *clause* 3.

The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.— *Id*, *sect.* 8, *clause* 1.

No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.— *Id.*, *sect.* 9, *clause* 4.

No tax or duty shall be laid on articles exported from any State. — *Id.*, *sect.* 9, *clause* 5.

over which the United States have no authority or power of taxation. The Court were equally divided upon the questions whether the act, being so far unconstitutional, was wholly invalidated; whether as to the income from personal property as such, the act was unconstitutional as laying "direct taxes" without apportioning them among the States; and whether any part of the tax, if not considered as a "direct tax," was invalid for want of uniformity.[1]

A rehearing was applied for and granted before a full Court, whereupon it was further adjudged by a majority of the Court, adhering to the two points already decided, that the taxes levied without apportionment upon income derived from invested personal property were also "direct taxes," and therefore unconstitutional, and that the said sections of the act being unconstitutional in these particulars were wholly invalid.[2]

The grounds for the judgment of the Court are given in the two opinions delivered by the learned Chief Justice, and appear to be in brief as follows:—

The equity of the bill is sustained because "The jurisdiction of a court equity to prevent any threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained."[3] No reference is made by the Chief Justice to Rev. Sts. § 3224, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

The constitutional questions involved are approached and decided from the historical point of view. "It appears that prior to the adoption of the Constitution nearly all the States imposed a poll tax, taxes on land, on cattle of all kinds, and various kinds of personal property."[4] The clause in the Constitution regarding direct taxes was the result of a compromise between conflicting views, "resting on the doctrine that the right of representation ought to be conceded to every community on which a tax is to be imposed, but crystallizing it in such form as to allay jealousies in respect of the future balance of power; to reconcile conflicting views in respect of the enumeration of slaves; and to remove the objection that, in adjusting a system of representation between the States, regard should be had to their relative wealth, since those

[1] 157 U. S. 586. [2] 158 U. S. 637.
[3] Dodge *v.* Woolsey, 18 How. 331; Hawes *v.* Oakland, 104 U. S. 450; 157 U. S. 553
[4] 157 U. S. 559.

who were to be most heavily taxed ought to have a proportionate influence in the government. The compromise, in embracing the power of direct taxation, consisted not simply in including part of the slaves in the enumeration of population, but in providing that as between State and State such taxation should be proportioned to representation." [1] It is then shown by various citations from the writings and speeches of members of the Constitutional Convention that it was expected that most of the revenue would be derived from duties on imports, and that divers of them used language in regard to the phrase "direct taxes" which would include direct taxes on personal property. The debate on the Act of June 5, 1794,[2] which placed a tax upon carriages, is referred to, and reference is also made to Madison's opinion that that act was unconstitutional, and more weight seems to be given to Mr. Madison's opinion than to that of the Supreme Court in Hylton *v.* United States,[3] which held that act to be constitutional, and no allusion is made to the fact that Madison apparently changed his opinion as to the constitutionality of such acts, since, when President, he signed several bills of like import.[4]

The learned Chief Justice, after citing all the acts of Congress which have levied either direct taxes or income taxes, asserts that all of them were passed as war measures.[5] He then discusses the four cases of Pacific Insurance Co. *v.* Soule,[6] Veazie Bank *v.* Fenno,[7] Scholey *v.* Rew,[8] Springer *v.* United States,[9] and holds them to be either not in point or else not to be controlling. He then says that a tax upon the income derived from real estate is a tax upon real estate, because as Lord Coke says, "What is the land but the profits thereof?" [10] And therefore that the tax upon income derived from rents and real estate is a tax upon land, and that a tax upon land is a "direct tax" within the meaning of the Constitution, and unconstitutional because not apportioned.

The logical result of this was extended upon the rehearing to income derived from personal property,[11] because "it would seem [to be] beyond reasonable question that direct taxation, taking the place as it did of requisitions, was purposely restrained to apportionment according to representation, in order that the former system

[1] 157 U. S. 563.
[2] 1 Stat. 373.
[3] 3 Dall. 171; 157 U. S. 569, *et seq.*
[4] 158 U. S. 649.
[5] 157 U. S. 572 & 573.
[6] Wall. 433.
[7] 8 Wall. 533.
[8] 23 Wall. 331.
[9] 102 U. S. 586.
[10] Co. Lit. 4 b.
[11] 158 U. S. 618.

as to ratio might be retained, while the mode of collection was changed."[1] "The reasons for the clauses of the Constitution in respect of direct taxation are not far to seek. The States, respectively, possessed plenary powers of taxation. They could tax the property of their citizens in such manner and to such extent as they saw fit; they had unrestricted powers. . . . They gave up the great sources of revenue derived from commerce; they retained the concurrent power or [of] levying excises, and duties if covering anything other than excises; but in respect of them the range of taxation was narrowed by the power granted over interstate commerce, and by the danger of being put at disadvantage in dealing with excises on manufactures. They retained the power of direct taxation, and to that they looked as their chief resource; but even in respect of that, they granted the concurrent power, and if the tax were placed by both governments on the same subject, the claim of the United States had preference. Therefore, they did not grant the power of direct taxation without regard to their own condition and resources as States."[2] "The founders anticipated that the expenditures of the States, their counties, cities, and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those of the Federal government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the general government should not be exercised, except on necessity; and, when the necessity arose, should be so exercised as to leave the States at liberty to discharge their respective obligations, and should not be so exercised, unfairly and discriminatingly, as to particular States or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made."[3] "We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property, and the property itself. Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom."[4] "Nor are we impressed with the contention that, because in the four instances in which

[1] 158 U. S. 619.
[2] 158 U. S. 620.
[3] 158 U. S. 621.
[4] 158 U. S. 628.

the power of direct taxation has been exercised, Congress did not see fit, for reasons of expediency, to levy a tax upon personalty, this amounts to such a practical construction of the Constitution that the power did not exist, that we must regard ourselves bound by it."[1] And the further argument is insisted upon by the learned Chief Justice, that, if a tax upon the income derived from municipal bonds is unconstitutional because it is a tax on the power of the States, the tax upon all incomes derived from invested properties must also be unconstitutional, because it is a "direct tax" upon the sources from which the income is derived, and is not apportioned.[2]

It is to be noted that in both the elaborate opinions delivered by the Chief Justice no case is cited by him in support of the conclusion of the Court. For it is to be observed that the three English cases, Attorney-General *v.* Queen Insurance Co.,[3] Attorney-General *v.* Reed,[4] and Bank of Toronto *v.* Lambe,[5] cited to the point that an income tax is a "direct tax," are hardly apposite.[6] In the first place, only the last one lays down the doctrine contended for, and that was apparently a self evident proposition, for the tax under consideration in that case was levied upon certain businesses by an act which professed to levy "certain direct taxes." The taxes under consideration in the first two cases were held *not* to be direct. In the second place, the question at bar was not what was or was not actually a direct tax, but what was a "direct tax" within the meaning of the Constitution of the United States. Furthermore, the assertion may be safely made that no case can be cited in support of the conclusion of the majority of the Court.

In regard to the question of the jurisdiction of a court of equity to entertain such a bill as this, there could be, of course, no question, if it were not for Rev. Sts. § 3224, above referred to. That part of the opinion of the Court which deals with this point cannot be criticized or answered better or more forcibly than is done by Mr. Justice White in his remarkably lucid, logical and powerful dissenting opinion: "Neither of these authorities [*viz.*: Dodge *v.* Woolsey, 18 How. 331; Hawes *v.* Oakland, 104 U. S. 450], I submit, is in point. In Dodge *v.* Woolsey, the main question at issue was the validity of a State tax, and that case did not involve the Act of Congress to which I have referred [*viz.*: Rev. Sts.

[1] 158 U. S. 629.
[2] 158 U. S. 630.
[3] 3 App. Cas. 1090.
[4] 10 App. Cas. 141.
[5] 12 App. Cas. 575.
[6] 158 U. S. 631.

§ 3224, Stat. 1867]. Hawes *v.* Oakland was a controversy between a stockholder and a corporation, and had no reference whatever to taxation."[1] "The decision here is, that this court will allow, on the theory of equitable right, a remedy expressly forbidden by the statutes of the United States."[2]

There can be no question as to the unconstitutionality of the tax upon the income derived from State and municipal bonds or upon the salaries of State or municipal officers. One sovereignty has no power of taxation on or over the instruments of government of another; and there was no controversy or difference, and there can be none, as to this, or as to the lack of power in the States to burden with taxation the instrumentalities of interstate or foreign commerce.[3] But the argument deduced from this in the opinion of the Court, to the effect that, if such taxation is unlawful because it creates a burden upon a subject over which there is no right or power of taxation, it must be direct taxation, and therefore the tax upon all incomes derived from invested properties must also be "direct" and unconstitutional because not apportioned among the several States, is fallacious; indeed, it is doubly fallacious.[4] In the first place, the attempted taxation of the instruments of government of another sovereignty, or the attempted placing of a burden by a State upon the instrumentalities of interstate or foreign commerce, has never been held to be direct taxation. That question could not possibly arise, for it is sufficient to make the tax invalid, if *any* burden, howsoever remote, is imposed. In the second place, it is one thing to hold that where there is no right of taxation at all, as in the case of one government taxing the instrumentalities of another sovereignty, any tax, however indirect, upon any money or property derived in any way from the legitimate exercise of those governmental functions is a burden upon them; and it is quite another thing to hold that, given the power and right to lay taxes upon certain subjects in certain ways, a tax is unconstitutional because it lays a burden indirectly, which it could not lay directly except by a different method.[5] There can be no question that the government of the United States has the power and the right to lay and collect taxes in some way upon all the property within its jurisdiction and subject to its sovereignty, and no valid

[1] 157 U. S. 609. [2] 157 U. S. 611.
[3] 157 U. S 646; 158 U. S. 630; 158 U. S. 665.
[4] 157 U. S. 584; 158 U. S. 630.
[5] 157 U. S. 646; 158 U. S. 665; 158 U. S. 691.

argument can be deduced against this right from an unsuccessful attempt to collect a tax upon a subject beyond its sovereignty. The question is not whether any burden can be placed upon land or other property by taxes levied by the rule of uniformity, but whether such burden be "direct taxation" or not within the meaning of the Constitution. Indeed, Mr. Justice Brown, in his dissenting opinion, after admitting that "a tax upon the rents or income of real estate is a tax upon the land itself," — a proposition which, it is submitted, is not true, — goes on to say: "But this does not cover the whole question. To bring the tax within the rule of apportionment, it must not only be a tax upon land, but it must be a *direct* tax upon land. . . . It does not follow . . . that every tax upon land is a direct tax. . . . It seems to me that it could hardly be seriously claimed that a tax upon the crops and cattle of the farmer, or the coal and iron of the miner, though levied upon the property while it remained upon the land, was a direct tax upon the land. A tax upon the rent of land in my opinion falls within the same category. . . . While . . . it is a tax upon land, it is a direct tax only upon one of the many profits of land."[1] It is evident that the argument of the learned Chief Justice proves too much, for it proves that any tax levied upon any property or upon any proceeds of property is a "direct tax," and therefore cannot be levied by the United States except by the rule of apportionment.

The argument based upon Lord Coke's statement to the effect that land is nothing but the profits thereof:[2] that a tax on rents is a "direct tax" upon the land, is, it is submitted with all deference, a complete *non sequitur*. For here the tax was upon rents already received, and no one can contend that the gift or sale or devise of such would pass the land itself, as a general conveyance or devise of all rents does. Even where there is a limited gift of rents, it does not pass the land,[3] and it is well settled that a tax upon rents and a tax upon the land itself are not double taxation.[4] Besides, a tax upon the income derived from land or upon its beneficial use is by no means analogous to a grant of the entire beneficial use. The one is a yearly and transient levy, the other is a grant of all interest in the land.

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[1] 158 U. S. 692.

[2] Co. Lit. 4 b.; 157 U. S. 580.

[3] Fox *v.* Phelps, 17 Wend. 393; 157 U. S. 589-590; 157 U. S, 646; 158 U. S. 667; 158 U. S. 692.

[4] 158 U. S. 702.

With regard to the historical argument in support of the judgment of the Court, besides the passages already quoted *verbatim* and others summarized as indicative of the historical material cited and relied upon by the learned Chief Justice, the following is his own summary of the results of his elaborate historical researches: "From the foregoing it is apparent: 1. That the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it. 2. That under the State systems of taxation all taxes on real estate or personal property or the rents or income thereof were regarded as direct taxes. 3. That the rules of apportionment and of uniformity were adopted in view of that distinction and those systems. 4. That whether the tax on carriages was direct or indirect was disputed, but the tax was sustained as a tax on the use and an excise. 5. That the original expectation was that the power of direct taxation would be exercised only in extraordinary exigencies, and down to August 15, 1894, this expectation has been realized." [1]

In regard to number five of this category of propositions it may be enough to say that it is scarcely an argument. Given the power of Congress to lay and collect a general income tax, no court can stipulate the time when that power shall or can be exercised. That is solely a question of expediency to be solved and determined by Congress alone. Moreover, it is conceived that if Congress has no power to levy certain taxes except in certain ways in ordinary times of peace, it has no power to levy them in other ways in time of war, and so nothing is gained by the fact insisted upon by the learned Chief Justice that all the prior income and direct taxes, which have been levied by Congress according to the rule of uniformity, were war measures.[2]

With number four of the above heads no quarrel can be had. Number three depends solely upon the validity of numbers one and two, and is a corollary to them.

If the question were not fundamental, lying at the very root of the whole subject, it would perhaps be enough to cite a sentence from the opinion of the Chief Justice, found ten pages prior to that upon which is contained proposition one, in answer thereto. The Chief Justice writes:[3] "Mr. Madison records: 'Mr. King

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[1] 157 U. S. 573.

[2] 157 U. S. 572, 573, 583; 158 U. S. 621; 158 U. S. 677.

[3] 157 U. S. 563.

asked what was the precise meaning of direct taxation. No one answered.'" Furthermore, it most definitely appears that no one then knew what the term "direct taxes" actually meant. No two of the members of the Constitutional Convention and statesmen of that time gave the words the same interpretation. And it can confidently be affirmed, with all deference, that no one has ever known or does now know with certainty all that the term implies. The Supreme Court of the United States on May 20, 1895, stood divided upon the question five to four.[1]

But the question is deeper than this, and cannot be thus cavalierly disposed of.

It seems to me that nothing is gained by the elaborate and exhaustive researches which have been made into the debates and writings in regard to the clauses relating to taxation in the Constitution.[2] These researches have only proved that some men held one opinion in regard to the meaning of "direct taxes," and some another, and that some changed their opinion. It is not of very great importance that James Madison believed that the Carriage Tax Act of 1794 was unconstitutional, and that later, when President of the United States, he signed bills passed by Congress which provided for the exaction of the same kind of taxes.[3] But, if it be important, as the majority of the Supreme Court seem to think, the facts as to Mr. Madison's opinion and change of opinion certainly strengthen the argument for the constitutionality of the income tax. It is a man's final opinion that is of the greatest weight, as it is a court's, especially when the man and the court have overruled their former judgments.

Every one knows, who knows anything at all about our constitutional history and constitutional law, the facts and considerations and conditions which led to the framing and adoption of our Constitution. It would be idle to reiterate them here. In the light of those circumstances the Constitution is to be construed, and in the light of those alone. All the arguments and citations were before the Supreme Court of the United States in Springer *v.* United States,[4] which were presented to it in the case under discussion,[5] but did not appear to be of any great weight to the then members of the Court. Indeed, it is submitted, with the greatest deference, that the weight given to Madison's original opinion

[1] 157 U. S. 559, 562, 563, 565–572; 158 U. S. 620, 622–629; 158 U. S. 649.
[2] 158 U. S 699.
[3] 158 U. S. 649.
[4] 102 U. S. 586.
[5] 157 U. S. 636.

by the present learned Chief Justice of the United States is due to the fact that it has unfortunately escaped his notice that Madison's final opinion was in favor of the constitutionality of such acts as the Carriage Tax Act. And it is further conceived, with the greatest deference, that too much weight was given to the learned and brilliant brief of Alexander Hamilton, who appeared for the United States in Hylton *v.* United States.[1] He was Secretary of the Treasury when the Carriage Tax Bill was passed, and his brief and argument in support of that act, by making a limited contention, ought not to be taken as his whole opinion. But even in that brief he says, as quoted by Mr. Chief Justice Fuller: "The following are presumed to be the only direct taxes: Capitation or poll taxes, taxes on lands and buildings, general assessments, whether on the whole property of individuals or on their whole real or personal estate."[2] Thus evidently meaning that a tax to be "*direct*" must be levied upon the *whole* real or personal property of all the inhabitants.

Provision is made in the Constitution for the levy and collection of all kinds of taxes known at the time of the making and adoption of that instrument. Excises, imposts, duties, capitation and direct taxes are all authorized *eo nomine*, and provision made for their assessment. If it be true that there are *direct* taxes which may be levied under the Constitution uniformly and *not* by apportionment, it is apparent that the term "direct taxes" in that instrument must have a limited and special meaning. Now, besides capitation taxes, which necessarily are direct, and which by the terms of the Constitution are to be levied by the rule of apportionment, if there ever was a direct tax, it was the carriage tax, the constitutionality of which was supported in Hylton *v.* United States,[3] and the succession tax levied by the Act of June 30, 1864,[4] and supported in Scholey *v.* Rew,[5] both of which were levied under the rule of uniformity. It is begging the question utterly to call them excises. Indeed, the remark of the learned Chief Justice in Pollock *v.* Farmers' Loan & Trust Co., that "what was decided in the Hylton case was, then, that a tax on carriages was an excise, and, therefore, an indirect tax," is, it is submitted, totally unintelligible, unless it is meant thereby that the carriage tax was not a "direct tax" within the meaning of the Constitution.[6]

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[1] 3 Dall. 171.
[2] 7 Hamilton's Works (Lodge's ed.), 332; 157 U. S. 572.
[3] 3 Dall. 171.
[4] 13 Stat. 287; 14 Stat. 140, 141.
[5] 23 Wall. 331.
[6] 158 U. S. 627.

The question therefore arises what is the limited meaning of the words in the Constitution?

It seems apparent on the face of the Constitution that the framers of it meant to indicate specifically all the different methods and forms of taxation, and to prescribe the manner in which each should be collected. Excises have been levied and collected according to the rule of uniformity, regardless of the fact that they were also direct taxes. It is strange that the form of direct taxation which was then most common and best known—namely, taxation of land —should not have been named or referred to. Indeed, it seems to have been almost the only subject of direct taxation by the States.[1] It is hardly possible that it could have escaped the attention of the Constitutional Convention, and it is conceded upon all hands that a direct tax upon land must be apportioned. If it be true, as is stated by Mr. Chief Justice Chase in Veazie Bank *v.* Fenno,[2] that in many, if not all, of the Southern States slaves were considered and held to be real property,[3] it follows that direct taxes on slaves would have to be apportioned. If there be validity in this suggestion, which seems to have escaped the notice of the learned counsel who argued the cause, and of all the members of the Court, we find again in this curious provision with regard to "direct taxes" the evasion of the Constitution as to slavery. But, if this be not so, and slaves were considered to be personalty, as seems to have been the case in the five original slave States, except Virginia,[4] still slaves are denominated as "persons" in the Constitution, and as such are clearly subject to capitation taxes, Veazie Bank *v.* Fenno, [5] which must also be apportioned. Indeed, no tax upon slaves is conceivable that is not a capitation tax, unless it be a license tax. And this suggestion is borne out strikingly by the early statutes of the United States, which levied

[1] 158 U. S. 686; 158 U.S. 699; 158 U.S. 701.

[2] 8 Wall. 533, 543.

[3] 158 U. S. 650.

[4] I am indebted for the greater part of the material for this note to Mr. James Parker Hall.

[4] Slaves were made real property in Virginia by Stat. 1705, c. 23, § 1. 3 Hen. 333. See also Stat. 1727, c. 11, § 3. 4 Hen. 222. Slaves were declared to be personal property in South Carolina by Stat. 1740; 3 S. C Stat at Large, 568; and in Georgia by Stat. 1770, c 203, § 1; Dig. Laws of Georgia, 163. Apparently there was no legislation on the subject in Maryland or North Carolina, at least neither Mr. Hall nor I have been able to find any. While there is no direct adjudication upon the point in either of these two latter States, the cases seem to assume that slaves were chattels. See 1 Hurd's Law of Freedom and Bondage, chap. vi., p. 222.

[5] 8 Wall. 533, 543.

direct taxes upon real property and slaves, and apportioned them among the several States.[1] These statutes, therefore, cannot be considered as sustaining the doctrine that a direct tax upon personalty must be apportioned.

It seems, therefore, if either of the suggestions which I have made be valid, that the terms "direct taxes" in the Constitution means only what it has been considered to mean for nearly one hundred years; namely, a direct tax upon real estate only. But even if this is not so, still the term must mean *direct* taxes, and it need not be, and it ought not to be, admitted that the taxes levied by sects. 27–37 of the Act of Congress of August 27, 1894, are direct taxes in any sense, either upon land or any invested property. As is said by Mr. Justice White: "The point involved is whether a tax on net income, when such income is made up by aggregating all sources of revenue and deducting repairs, insurance, losses in business, exemptions, etc., becomes to the extent to which real estate revenues may have entered into the gross income, a direct tax on the land itself. In other words, does that which reaches an income, and thereby reaches rentals indirectly, and reaches the land by a double indirection, amount to direct levy on the land itself?"[2] It is submitted that this is an absolutely unanswerable argument, and yet it is nothing but a plain statement of fact; and the same argument applies to the tax on income derived from personalty. The question is not whether Congress can or cannot levy a tax upon personalty, as it is stated to be in the opinion of the majority of the Court,[3] but whether Congress must apportion a direct tax levied upon personalty. No one contends or believes that the United States cannot tax personal property directly in some way.

It is not true that Congress has hitherto neglected to exercise its right of taxation on personal property, as seems to be intimated by the learned Chief Justice.[4] Beside the Carriage Tax Act of June 5, 1794, direct taxes on personal property were levied by the rule of *uniformity* by the Act of January 18, 1815, c. 22, 3 Stat. 180, by which duties were imposed upon (among other articles) pig-iron, hats, caps, and umbrellas, manufactured or made for sale within the United States. By the Acts of July 1, 1862, c. 119, 12 Stat. 432, 473; June 30, 1864, c. 173, 13 Stat. 223, 281; March 3, 1865, c. 78

[1] Acts of July 14, 1798, c. 75, 1 Stat. 597; August 2, 1813, c. 37, 3 Stat. 53; January 9, 1815, c. 21, 3 Stat. 164; March 5, 1816, c. 24, 3 Stat. 255.

[2] 157 U. S. 645.

[3] 158 U. S. 629.

[4] 158 U. S. 629.

13 Stat. 469, 479; March 10, 1866, c. 15, 14 Stat. 4, 5; March 2, 1867, c. 169, 14 Stat. 471, 480; July 14, 1870, c. 255, 16 Stat. 256; taxes were imposed upon incomes whether derived from any kind of property, rents, interest or from any source whatever, and levied by the rule of *uniformity*.[1]

The cases of Hylton *v.* United States,[2] Pacific Insurance Co. *v.* Soule,[3] Veazie Bank *v.* Fenno,[4] Scholey *v.* Rew,[5] Springer *v.* United States,[6] have been so elaborately discussed in the opinions of the majority and minority of the Supreme Court that no useful purpose would be served by reiterating an analysis of them here. Suffice it to say, that Pollock *v.* Farmers' Loan & Trust Co. at the very least is utterly inconsistent with the reasoning of Scholey *v.* Rew as to the tax upon income derived from rentals, and Hylton *v.* United States and Springer *v.* United States as to the tax on income derived from personal property.

If the views of the minority of the Justices of the Supreme Court of the United States in Pollock *v.* Farmers' Loan & Trust Co. should in the end prevail, it would not be the first instance within very recent times of such an event, when the majority of the Court have overruled a line of decisions upon a question of constitutional law, which had been considered as settling the point. Plumley *v.* Massachusetts[7] in effect overrules Leisy *v.* Hardin.[8]

Francis R. Jones.

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[1] 158 U. S. 651; see also 157 U. S. 626.
[2] 3 Dall. 171.
[3] 7 Wall. 433.
[4] 8 Wall. 533.
[5] 23 Wall. 331.
[6] 102 U. S. 586.
[7] 155 U. S. 461.
[8] 135 U. S. 100.